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MATSON TERMINALS, INC.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

MATSON TERMINALS, INC.,)	Case 20-CA-178312
)	
and)	RESPONDENT MATSON TERMINALS,
)	INC.'S EXCEPTIONS TO THE
HAWAII TEAMSTERS & ALLIED)	ADMINISTRATIVE LAW JUDGE'S
WORKERS UNION, LOCAL 996)	DECISION (DATED FEBRUARY 20,
)	2018); CERTIFICATE OF SERVICE
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**RESPONDENT MATSON TERMINALS, INC.'S EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION (DATED FEBRUARY 20, 2018)**

Matson Terminals, Inc. ("Matson") hereby files Exceptions to the Administrative Law Judge's Decision, dated February 20, 2018 ("Decision") in Case No. 20-CA-178312. Matson takes exception to the following questions of procedure, law and/or fact addressed by the Decision.

Analysis of Unfair Labor Practice

- A. Matson takes exception to the Decision's finding that "Respondent's transfer of Unit employees' barge menu work, date June 3, 2016, is a mandatory subject of bargaining" (Decision at p. 5, lines 28-30).

The transfer of barge menu work was not a mandatory subject of bargaining because it did not involve a material, substantial, and significant change.

It is well-settled that an employer's duty to bargain about changes in terms and conditions of employment arises only when the changes are "material, substantial, and significant." *See Peerless Food Products, Inc.*, 236 NLRB 161 (1978) ("But not every unilateral change in work, or in this case access, rules constitutes a breach of the bargaining obligation. The change unilaterally imposed must, initially, amount to a material, substantial, and significant one") (citing *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976)); *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006) ("Generally, an employer has a duty to bargain with the exclusive representative of a unit of its employees before making a change in wages, hours, or other working conditions, but that duty arises only if the change is a material, substantial, and a significant one affecting the terms and conditions of employment of bargaining unit employees"). The Administrative Law Judge also recognized this legal requirement. *See*

Decision at p. 5, lines 7-8 (employer violates Sections 8(a)(5) and (1) “when it makes substantial and material unilateral changes” on mandatory subjects of bargaining).

Critically, the burden falls on the General Counsel to prove that the change was material, substantial, and significant. *See North Star Steel*, 347 NLRB at 1367 (“The General Counsel bears the burden of establishing that the change was material, substantial, and significant”); *see also infra*.

Although a change in duties that results in increased or reduced pay/hours of work could be material, substantial, and significant, the converse is also true: If a change in duties does not affect schedule or pay (and does not result in the removal of positions or personnel from the bargaining unit), it generally does not trigger a duty to bargain. The following cases are illustrative.

In *Ead Motors Eastern Air Devices, Inc.*, 346 NLRB 1060 (2006), the employee held the toolroom position, but “for probably half of her time” she was performing duties in the stockroom. The employer then completely eliminated the employee’s toolroom position, causing her half-time toolroom duties to disappear and her part-time stockroom duties to expand to full-time. The Board found that the employer had no duty to bargain about this change, given that the employee’s schedule, pay, and at least some of her duties appeared to be unchanged.

The record does not demonstrate that French’s transfer from the toolroom to the stockroom, and the attendant elimination of the toolroom position, amounts to such a change. The elimination of the toolroom position did not affect French’s pay or her schedule. As to her duties, prior to the Respondent’s elimination of the toolroom position, French’s work involved working some of her time in the toolroom and some of her time in the stockroom. Because of the change, French merely began doing full time what she had been doing part time. There is no evidence concerning the duties of either position. Based on all of the above, we find that it has not been established that the elimination of the toolroom position altered French’s job duties in any material, substantial, and significant way. As such, we find that the unilateral change

to French's terms and conditions of employment was de minimis, and that the Respondent did not violate Section 8(a)(5) and (1) in this respect.

Id. at 1065. **In short, even a modification to half of an employee's total duties – without a change to schedule or pay – did not constitute a material, substantial, and significant change.**

In *North Star Steel*, the employer unilaterally transferred the production of 175 tons of steel from its Monroe facility to its St. Paul facility. The Board found that this unilateral transfer did not violate the Act because it did not adversely affect the employees, noting in particular that there was no loss of work hours/wages.

The General Counsel offered no evidence that the December transfer of 175 tons of steel production adversely affected any employee. The judge noted that the timing 'coincided' with reduction in employee hours and contemplated layoffs due to business downturn affecting the steel industry. There is no dispute that the steel industry was suffering depressed business conditions that affected the Respondent. But there is no evidence in the record that demonstrated a causal connection between this minimal transfer of unit work in December and the reduction in the employee hours in November and the layoffs in January 2001. In fact, the General Counsel offered no evidence concerning the number of employees or the number of work hours involved in processing the 175 tons at either the Monroe or St. Paul facilities.

347 NLRB at 1366-67 (emphasis added).

In *MMC Materials, Inc.*, 2005 NLRB LEXIS 538 (2005), the employer, among other things, (a) changed the drivers' schedule from a fixed start time to a staggered start time that required drivers to call in each afternoon to find out their next day's reporting time; and (b) reassigned the plant operator's duties of preparing a dispatch ticket to a newly-created Central Dispatch service. *See id.*, at *32-37, 48-49. The Administrative Law Judge found that such changes were not material, substantial, and significant. As to the schedule change, the

Administrative Law Judge found that the “inconvenience” and “disadvantage” to the drivers was insufficient:

Counsel for the General Counsel submits that without a standardized start time, drivers were required to call in each afternoon to find out their reporting time for the next work day. While this may pose an inconvenience for drivers, the Board has found that the mere fact that an employee is “disadvantaged” by a change is not alone sufficient to satisfy the test of whether a change must be bargained.

Id., at *38 (emphasis added). As to the loss of ticket duties, the Administrative Law Judge also found this to be of “no significant detriment.”

Even when an employer makes a change that would otherwise pertain to a mandatory subject of bargaining, the Board has not found a violation when there has been no significant detriment to unit employees. See *Alamo Cement Co.*, 277 NLRB 1031 (1985). In summary, I do not find that Respondent has unilaterally changed the job duties as alleged. Additionally, even if there was a change in job duties, such change does not constitute a material, substantial, or significant change.

Id., at *59 (emphasis added).

In *Alamo Cement Co.*, 277 NLRB 1031 (1985), the Board found that the employer’s reclassification of an employee from mix chemist to assistant chief chemist – resulting in the employee preparing reports for the Chief Chemist and filling in for the Chief Chemist – was not a material, substantial and significant change. This was the case even though the reclassification changed the employee’s hourly wage.¹ *Id.* at 1031.

In the present situation, the General Counsel fails to meet his burden to show that the reassignment of barge menu work constitutes a “material, substantial, and significant change” to

¹ The Board has found changes insufficiently material in other situations as well. See, e.g., *Peerless Food Products, Inc.*, 236 NLRB at 161 (employer’s limitation of union business representative’s access to employees was not a material, substantial, and significant change); *J.W. Fergusson & Sons, Inc.*, 299 NLRB 882, 892 (1990) (“transferring five minutes from the afternoon break to the lunch break, thus diminishing the afternoon break by five minutes and enlarging the lunch period by five minutes,” was not a material, substantial, and significant change).

the supervisors. For instance, the General Counsel made no argument (much less presented evidence) that the reassignment caused a reduction in the supervisors' hours/pay or that it otherwise detrimentally affected the supervisors' pay, benefits, hours, or scheduling. *See* General Counsel's Brief; Matson's Brief at p. 6.

Insofar as the record does not definitively address the impact of the change, this further supports Matson's position. Where there is insufficient evidence of how a change affects the bargaining unit employees, the General Counsel has not met his burden. *See, e.g., North Star*, 347 NLRB at 1366-67 (finding no violation where, although employer unilaterally transferred production of 175 tons of steel from Monroe facility to St. Paul facility, there was "no evidence [of any] reduction in the employee hours"); *The Fremont-Rideout Health Group*, 357 NLRB 1899, 1904 (2011) (finding no violation where, although employer issued a memorandum describing change in counting absences under attendance policy, the General Counsel presented no evidence of the specific impact on employees); *McKesson Corp.*, 2014 NLRB LEXIS 851 (2014) (finding no violation where, although employer eliminated the paid Gold's Gym benefit and replaced it with paid membership at one of the gyms affiliated with employer's benefit program, "there is insufficient evidence to establish whether there is a difference between the dollar value of the benefit, for employee and family member, under the old program and the comparable dollar value under the new program. Without this evidence, the General Counsel cannot carry the government's burden of proving that the change was material, substantial, and significant"), *adopted in* 2015 NLRB LEXIS 722 (2015); *Mike-Sell's Potato Chip Co.*, 2017 NLRB LEXIS 374, at *75 (2017) (finding no violation where, although employer sold its delivery trucks which could have impacted its drivers' work opportunity, the General Counsel

and Union failed to show how this created a material, substantial, and significant change to the drivers).

B. Matson takes exception to the Decision's finding that Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally transferred bargaining unit barge menu work performed by Unit employees, to nonunit bargaining unit employees (Decision at page 5, lines 33-36) and that Matson's actions were unlawful (Decision at page 6, line 10).

As explained above, there was no duty to bargain about the transfer of barge menu work because such transfer was not a material, substantial, and significant change.

Alternatively, even assuming that the transfer did constitute a material, substantial, and significant change (which it in fact did not), there was still no duty to bargain because such transfer was legally required by Matson's agreement with the ILWU. *See* Brief at pp. 6-10.

Barge menu work involves communicating to crane operators which containers to load onto or off-load from the barge. *See* Stip. at par. 10(b). Such work plainly falls within the scope of various Matson-ILWU agreements.² These include (a) Matson's and the ILWU's collective bargaining agreement, (b) their 2008 letter of understanding, which is incorporated into the collective bargaining agreement,³ and/or (c) their 2001 discussions.

- The collective bargaining agreement, Section 2.01, states that the "the provisions of this Agreement shall apply to all checking of cargo on vessels and on docks when such work is performed by employees of the Employer." *See* Jt. Ex. J at 5.

² These agreements were all made prior to the Teamsters' May 2016 certification. *See* Stip. at par. 14(c), Jt. Ex. J at 23, 38.

³ *See* Stip., Jt. Ex. J at 2 (collective bargaining agreement index identifying the Letters of Understanding as exhibits to the agreement).

According to the Merriam-Webster Learner's Dictionary, the definition of "check" includes "to look at or in (a place) in order to find or get something or someone." <http://www.learnersdictionary.com/definition/check> (emphasis added).⁴

- The September 15, 2008 letter of understanding recognizes those "traditionally wharf clerk functions generally identified as directing and executing the flow of cargo." *See* Jt. Ex. J at 38.

According to the Merriam-Webster Learner's Dictionary, the definition of "direct" includes "to cause (someone or something) to turn, move, or point in a particular way"; "to cause (someone's attention, thoughts, emotions, etc.) to relate to a particular person, thing, goal, etc."; "to guide, control, or manage (someone or something)"; "to ask or tell (a person or group) to do something"; and "to order (something) to be done." <http://learnersdictionary.com/definition/direct>

- The 2001 discussions between Matson and the ILWU confirmed that ILWU wharf clerks were continuing to control the flow of cargo to and from the crane. *See* Stip. at par. 14(c).

See Stip. at par. 14(c), Jt. Exh. J at pp. 5, 38; Matson Brief at pp. 3-4.

Given these agreements, Matson was legally obligated to assign the barge menu work to the wharf clerks. *See* 29 U.S.C. 185 (allowing suits to enforce labor agreements).

In turn, because Matson was obligated to assign barge menu work to the wharf clerks, Matson had no duty to bargain with the Teamsters about such reassignment. *See Murphy Oil USA, Inc.*, 286 NLRB 1039, 1042 (1987) (where OSHA rule prohibited consumption of food in areas exposed to toxic material, employer could unilaterally impose a work rule in accordance therewith; "Respondent was not only within its rights, but also legally bound to adopt a rule that complied with Federal Law. I, therefore, find no violation of Section 8(a)(5) by its unilateral imposition of this rule"); *Exxon Shipping Company*, 312 NLRB 566, 568 (1993) ("we find the

⁴ Section 2.04 of the CBA recognizes that Section 2.01 duties are not exhaustive and that additional duties can be added by agreement of the parties. *See* Stip., Jt. Ex. J at p. 5. Thus, even if barge menu work does not fall under "checking of cargo," it falls under the direction, execution or control of the flow of cargo which Matson and the ILWU have recognized as wharf clerk duties. *See supra*.

Respondent was permitted to adopt a rule that complied with Federal maritime law.

Accordingly, we find no violation of the Act”); *Standard Candy Co.*, 147 NLRB 1070, 1073 (1964) (“the Company was required to comply with the new minimum wage rate established under the FLSA and, accordingly, raised the pay rate for seven of its employees from \$1.15 to \$1.25 an hour. I find the Company did not violate the Act in adopting these wage changes”).

Put another way, such bargaining would have been futile. *See Herbert Harvey, Inc. v. NLRB*, 424 F.3d 770, 774-75 (D.C. Cir. 1969) (employer “is not required to do the impossible or to engage in a mere exercise in futility; rather, the purpose of collective bargaining is to produce an agreement and not merely to engage in talk for the sake of going through the motions. And the doing of a useless and futile thing is no more required in collective bargaining between an employer and a labor union than in other activities”) (quotations citations omitted).

- C. Matson takes exception to the Decision’s finding that, with regard to Matson’s argument that it was obligated to transfer the barge menu work pursuant to the ILWU collective bargaining agreement and letter of understanding, such argument is not persuasive (Decision at p. 6, line 4).

As noted above, based upon its agreements with the ILWU, Matson was in fact obligated to assign the barge menu work to the wharf clerks.

- D. Matson takes exception to the Decision’s reliance on the proposition that “a decision to subcontract or transfer unit work alters the terms and conditions of employment is therefore a mandatory subject of bargaining” (Decision at page 5, 13-19) and the proposition that “once a specific job has been included within the scope of a bargaining unit by either Board action or consent of the parties, the employer cannot unilaterally remove or modify that position without first securing the consent of the Union or the Board” (Decision at page 5, lines 19-24).

As noted above, a reassignment of work does not trigger bargaining if it does not constitute a material, substantial, and significant change.

The cases cited by the Administrative Law Judge are not to the contrary. Rather, those cases are inapposite because they deal with the wholesale elimination of job classifications – and/or removal of personnel – from the bargaining unit (which is almost invariably a material, substantial, and significant change). They do not hold that any reassignment of work is a material, substantial, and significant change. See *Regal Cinemas, Inc.*, 334 NLRB 304 (2001) (employer eliminated projectionist position and assigned projectionist duties to supervisors and managers); *The Cincinnati Enquirer, Inc.*, 279 NLRB 1023, 1031-32 (1986) (employer eliminated an assistant features editor position and replaced it with a newly-created supervisor position performing same duties); *Hill-Rom Co. v. NLRB*, 957 F.2d 454, 456 (7th Cir. 1992) (employer eliminated the inspector classifications and transferred the work to newly-created Quality Assurance Technician positions which were largely filled by former inspectors); *United Technologies Corp.*, 292 NLRB 248 (1989) (employer removed the Production Control Coordinator position from the bargaining units); *Bay Shipbuilding Corp.*, 263 NLRB 1133 (1982) (employer diminished the number of loft positions in the bargaining unit and moved several loft employees outside the union to do similar work albeit with new technology).

By contrast, in the present situation, there has been no removal of positions or personnel from the bargaining unit, nor even a decrease in hours.

E. Matson takes exception to the Decision's reliance on the fact that Matson "fails to present any evidence as to how this transfer of work is immaterial, insubstantial, and insignificant" (Decision at page 5, footnote 7).

As noted above, it is the General Counsel's burden to show that the reassignment was material, substantial, and significant, and the absence of probative evidence cuts against the General Counsel. It is not Matson's burden to prove that the reassignment was "immaterial,

insubstantial, and insignificant.” *See* Decision at p. 5, n. 7. Although the General Counsel cites to *Weather Tec. Corp.*, 238 NLRB 1535, 1536 (1978), that case does not hold that the employer bears such a burden.

F. Matson takes exception to the Decision’s finding that “it is irrelevant as to what work the ILWU represented employees performed on the West Coast and on Kauai (Decision at page 6, lines13-15).

As set forth in its Brief, such industry practice can be relevant to interpreting a collective bargaining agreement. *See* Brief at pp. 7-8. In this case, while the language of the collective bargaining agreement and letter of understanding plainly covers barge menu work, to the extent that there is any ambiguity, the practice on the West Coast and Kauai further affirms that barge menu work is within the scope of wharf clerk duties.

G. Matson takes exception to the Decision’s statement that Matson cites to no law which requires the barge menu work to be performed by ILWU employees (Decision at page 6, lines 19-20).

In support of the proposition that there is no duty to bargain about a legally-required action, Matson’s Brief cited to *Murphy Oil USA, Inc.*, 286 NLRB No. 104 (1987) and *Exxon Shipping Company*, 312 NLRB No. 93 (1993). *See* Brief at pp. 9-10.

In addition, Matson herein has cited to *Herbert Harvey, Inc. v. NLRB*, 424 F.3d 770, 774-75 (D.C. Cir. 1969) for the proposition that an employer is not required to engage in futile bargaining, and to 29 U.S.C. 185 (permitting “suits for violation of contracts between an employer and a labor organization”) for the proposition that an employer must comply with its contractual obligations to a labor organization.

- H. Matson takes exception to the Decision's position that "I decline to interpret the ILWU collective bargaining agreement and letter of understanding as to whether the barge menu work should be performed by the ILWU represented employees. Instead, Respondent failed to provide notice and an opportunity to bargain to the Union when it transferred barge menu work, thereby violating Section 8(a)(5) and (1) of the Act" (Decision at p. 6, lines 23-28).

The Administrative Law Judge erred in declining to interpret the collective bargaining agreement and letter of understanding.

A collective bargaining agreement not only can but should be interpreted when needed to resolve an unfair labor practice. This obligation was recognized in *NLRB v. C&C Plywood Corp.*, 385 U.S. 421 (1967), where the Supreme Court found that the Board had properly interpreted the labor agreement as needed to resolve the unfair labor practice charge:

But in this case the Board has not construed a labor agreement to determine the extent of the contractual rights which were given the union by the employer. . . . The Board's interpretation went only so far as was necessary to determine that the union did not agree to give up these statutory safeguards. Thus, the Board, in necessarily construing a labor agreement to decide this unfair labor practice case, has not exceeded the jurisdiction laid out for it by Congress.

Id. at 427.

In the present instance, the ILWU agreements bear directly on the issue in this case (Matson Brief at pages 6 to 9), and therefore those agreements should be interpreted. As noted above, once those agreements are interpreted, it is clear that Matson was obligated to assign the barge menu work to the ILWU employees.

Conclusions of Law

- I. Matson takes exception to the conclusion that it violated Section 8(a)(5) and (1) by, on or about June 3, 2016, transferring barge menu work without providing the Union with notice and the opportunity to bargain.

As explained above, Matson did not have to bargain about the reassignment of barge menu work because (a) such reassignment was not a material, substantial, and significant change, and, alternatively (b) such reassignment was legally required, thereby excusing Matson from bargaining.

J. Matson takes exception to the conclusion that the above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

As explained above, there was no unfair labor practice. Matson did not have to bargain about the reassignment of barge menu work because (a) such reassignment was not a material, substantial, and significant change, and, alternatively (b) such reassignment was legally required, thereby excusing Matson from bargaining.

Remedy

K. Matson takes exception to the Remedy in its entirety.

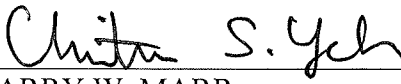
As explained above, Matson did not commit an unfair labor practice, and therefore the remedy is not warranted.

Order

L. Matson takes exception to the Order in its entirety.

As explained above, Matson did not commit an unfair labor practice, and therefore the Order is not warranted.

DATED: Honolulu, Hawaii, April 3, 2018.


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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
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CERTIFICATE OF SERVICE

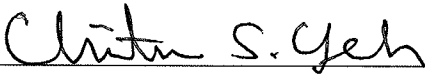
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DATED: Honolulu, Hawaii, April 3, 2018.



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